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No. 88-764 (3)

IN THE

Supreme Court Of The United States

October Term, 1988

SAMUEL JONES, JR.,
Petitioner,

v.

PREUIT & MAULDIN, a partnership composed of E. F. Mauldin, individually and as Executor or Administrator of the Estate of Leonard Preuit, Deceased; E. F. MAULDIN, individually and as Executor or Administrator of the Estate of Leonard Preuit, Deceased; and PREUIT MAULDIN,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. In light of this Court's recent decision in *Owens v. Okure,* is Petitioner's section 1983 action now barred by Alabama's general or residual personal injury limitations period?

II. Are private individuals who invoke presumptively valid state statutory prejudgment attachment procedures entitled to qualified immunity in an action brought against them by a debtor seeking damages under 42 U.S.C. section 1983?

III. Did a lienholder-creditor violate a debtor's clearly established constitutional rights of which a reasonable person would have known by retaining an attorney who obtained issuance of a pre-judgment writ of attachment from a state court judge, upon the filing of an affidavit and bond, when the debtor was afforded an opportunity for a reasonably prompt post-seizure hearing?

IV. Did Petitioner's failure to avail himself of the post-seizure remedies available to him under Alabama law operate as a waiver of his right to claim that such remedies do not comport with due process?

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Preuit & Mauldin, a partnership, E. F. Mauldin, individually and as the Executor of the Estate of Leonard Preuit, and Preuit Mauldin (hereinafter referred to collectively as "Respondents" or "P & M"), respectfully request that this Court deny the petition for writ of certiorari seeking review of the judgment of the United States Court of Appeals for the Eleventh Circuit dated August 10, 1988.

OPINIONS BELOW

The Eleventh Circuit's *en banc* opinion is reported in *Jones v. Preuit & Mauldin,* 851 F.2d 1321 (11th Cir. 1988) *(en banc),* and is reproduced in the Petition for Writ of Certiorari, Appendix pp. App. 161-297. The district court's opinion is reported in *Jones v. Preuit & Mauldin,* 634 F. Supp. 1520 (N.D. Ala. 1986).

The district court's initial opinion dismissing Petitioner's complaint as barred by the applicable statute of limitations is reported in *Jones v. Preuit & Mauldin,* 586 F. Supp. 1563 (N.D. Ala. 1984). The Eleventh Circuit's opinion reversing this judgment of the district court is reported in *Jones v. Preuit & Mauldin,* 763 F.2d 1250 (11th Cir. 1985), and is reproduced in the petition, Appendix pp. App. 1-45.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. section 1254(1) to review the judgment of the United States Court of Appeals for the Eleventh Circuit dated August 10, 1988.

STATUTES AND RULES INVOLVED

The principal statute involved in this action is 42 U.S.C. section 1983, which reads as follows:

> 42 U.S.C. § 1983. Civil Action for Deprivation of Rights.
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

The following Alabama statutes and rules also are involved in this case: Alabama Code sections 6-2-34, -38, -39, 6-6-41 to -46, -100, -142, -146, -148, 35-11-110, -111 and Rule 65.1 of the Alabama Rules of Civil Procedure. These statutes and rules are reproduced at pp. A-1 to A-9 of the Appendix hereto.

STATEMENT OF THE CASE

With the exception of that portion of the statement of the case relating to the proceedings and dispositions of the courts below, P & M is unable to concur in the statement of the case set forth in the petition, primarily because it contains factual assertions which differ in several respects from the facts as set forth by the Eleventh Circuit and which are wholly irrelevant to the disposition of the legal issues presented by the petition. Therefore, P & M provides the following statement of the case.

In the summer of 1981, P & M provided parts and labor in performing repair work on three cotton pickers owned by Petitioner. Petitioner agreed to pay for the repair work from the proceeds of his fall 1981 cotton harvest, but was unable to do so. The bill for parts and labor for the repairs exceeded $10,000.00.

In February, 1982, Preuit Mauldin consulted with an attorney concerning Petitioner's failure to satisfy the debt. Mr. Mauldin relied upon that attorney to prepare the documents necessary to collect the debt owed by Petitioner. Mr. Mauldin had no legal training or experience and had never sought the issuance of a writ of attachment for the collection of a debt.

Mr. Mauldin's attorney prepared a summons and complaint, an affidavit for attachment to be signed by Mr. Mauldin, and an attachment bond for each of the three cotton pickers seeking the enforcement of a mechanic's lien. The Circuit Judge of Lawrence County, Alabama signed an order in each case dated February 15, 1982 authorizing the issuance of a writ of attachment for each of the three cotton

pickers. The summons and complaint in each case, together with the order and writ of attachment, were served on Petitioner on April 8, 1982. Since picking season generally begins in late August or sometime thereafter and runs through January or February, the cotton pickers were not in use during this time of the year.

On the day that he was served in each of these lawsuits, Petitioner consulted with his attorney, Harold Speake. However, Petitioner never filed any objection to the attachments in the pending civil actions in which he was a defendant, nor did he ever move in those actions to have the attachments dissolved. Furthermore, Petitioner never filed an answer or other pleading in the civil actions filed against him on behalf of P & M. A default judgment was entered against Petitioner in each of the three lawsuits on May 19, 1982.

Dan Gilchrist and Citizens Bank were named in the complaints filed on behalf of P & M as involuntary plaintiffs due to their claimed interest in the cotton pickers. On the day that Petitioner was served in each of the three lawsuits, Gilchrist and Citizens Bank filed motions in the pending civil actions seeking the dissolution of each of the attachments on the grounds that they held a prior perfected security interest in the cotton pickers. These motions were filed by a law partner of Harold Speake, the attorney with whom Petitioner had consulted concerning the seizures. Although Petitioner had consulted with Speake, Petitioner did not join in these motions nor did he file his own separate motion to dissolve any of the three writs of attachment that had been issued.

On June 15, 1982, a hearing was held before the Circuit Judge on the motions filed on behalf of the involuntary plaintiffs seeking the dissolution of the attachments. Evidence was introduced at the hearing in support of P & M's claim in each of the three lawsuits. Petitioner testified as a witness at the hearing and admitted that he was indebted to P & M for the repair work performed on the cotton pickers. At the hearing, neither Petitioner nor his attorney contested the attachment of the cotton pickers by joining in the

motions filed on behalf of the involuntary plaintiffs, filing his own motions to dissolve the attachments, or otherwise.

Following the hearing, the Circuit Judge denied the motions for dissolution filed by the involuntary plaintiffs. The Circuit Judge also entered orders perfecting the mechanic's liens and confirming the default judgments entered against Petitioner for his failure to answer and defend the civil actions. Petitioner took no further action until August 16, 1983 when, through his attorney, J. G. Speake, he filed a motion in two of the three lawsuits under Rule 65.1 of the Alabama Rules of Civil Procedure seeking a forfeiture of P & M's attachment bonds. These motions were denied and Petitioner did not seek further review of this ruling. Subsequent thereto, Petitioner initiated this action under section 1983 alleging that P & M had violated his constitutional right of due process. Jurisdiction in the district court was invoked pursuant to 28 U.S.C. sections 1331 and 1343(a)(3).

REASONS FOR DENYING THE WRIT

I. This Court's Recent Decision in *Owens v. Okure* Renders The Issues Presented In The Petition Moot.

On January 10, 1989, this Court issued its opinion in the case of *Owens v. Okure,* No. 87-56 (U.S. January 10, 1989). The issue presented in that case was whether a federal court in a federal civil rights action must borrow a state's general or residual personal injury limitations period, rather than the limitations period for personal injury caused by intentional torts, when the statutory scheme provides different statutes of limitations for tortious injuries. This same issue was initially raised in the present action. The district court entered an order dismissing Petitioner's complaint as barred by the applicable statute of limitations. Petitioner had filed his complaint approximately twenty-two months after the seizure of his cotton pickers. The court held that Alabama's one-year general or residual personal injury limitations

period[1] rather than its six-year limitations period for intentional torts [2] should be applied to actions brought under section 1983. *See Jones v. Preuit & Mauldin,* 586 F. Supp. 1563 (N.D. Ala. 1984), *rev'd,* 763 F.2d 1250 (11th Cir. 1985), *cert. denied,* 474 U.S. 1105 (1986). The Eleventh Circuit reversed the district court's dismissal, holding that the six-year limitations period for intentional torts should be applied to actions brought under section 1983. *See Jones v. Preuit & Mauldin,* 763 F.2d 1250 (11th Cir. 1985), *cert. denied,* 474 U.S. 1105 (1986). P & M petitioned this Court for writ of certiorari which was denied on January 27, 1986, with Justice White dissenting from the denial of certiorari. *See Preuit & Mauldin v. Jones,* 474 U.S. 1105 (1986).

In *Owens v. Okure,* this Court held that when "state law provides multiple statutes of limitations for personal injury actions, courts considering section 1983 claims should borrow the general or residual statute for personal injury actions." Under this holding, Petitioner's claim against P & M is barred by Alabama's one-year general or residual personal

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[1]Section 6-2-39(a)(5) of the Alabama Code provided as follows:

> § 6-2-39. Same—One Year.
> (a) The following must be commenced within one year:
> * * *
> (5) Actions for any injury to the person or rights of another not arising from contract and not specifically enumerated in this section . . .

Ala. Code § 6-2-39(a)(5) (1975) (repealed 1985). The Alabama legislature repealed section 6-2-39 effective January 9, 1985 and extended the relevant limitations period to two years. *See* Ala. Code § 6-2-38(l) (Cum. Supp. 1988).

[2]Section 6-2-34(1) of the Alabama Code provides as follows:

> § 6-2-34. Same—Six years.
> The following must be commenced within six years:
> * * *
> (1) Actions for any trespass to person or liberty, such as false imprisonment or assault and battery. . .

Ala. Code § 6-2-34(1) (1975).

injury limitations period.[3] Thus, the issues raised in the petition are now moot.

II. The Eleventh Circuit Correctly Applied Applicable Decisions Of This Court In Holding That P & M Was Entitled To Prevail On Its Defense Of Qualified Immunity.

A. *The Eleventh Circuit Correctly Held That P & M Was Entitled To Assert The Defense Of Qualified Immunity.*

Although section 1983 "creates a species of tort liability that on its face admits of no immunities," *Imbler v. Pachtman,* 424 U.S. 409, 417 (1976), this Court consistently has recognized that immunity is available under section 1983 when the "tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that 'Congress would have specifically so provided had it wished to abolish the doctrine.' " *Owen v. City of Independence,* 445 U.S. 622, 637 (1980) (quoting *Pierson v. Ray,* 386 U.S. 547, 555 (1967)). The qualified immunity claimed by P & M satisfies both of these criteria set forth in *Owen.*

When section 1983 was enacted, the common law recognized two possible tort remedies for the wrongful institution of attachment proceedings: the torts of malicious prosecution and wrongful attachment. To recover under either of these torts, the plaintiff was required to demonstrate that the attachment proceeding was commenced with malice and without probable cause. *See Buller v. Buechler,* 706 F.2d 844, 851 (8th Cir. 1983); *Folsom Investment Co. v. Moore,* 681 F.2d 1032, 1038 (5th Cir. Unit A 1982); *see also* W. Keaton, *Prosser and Keaton On The Law of Torts* § 120 (5th ed. 1984).

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[3]In footnote 5 of its opinion in *Owens,* this Court cited the Eleventh Circuit's decision in *Jones v. Preuit & Mauldin,* 763 F.2d 1250 (11th Cir. 1985), *cert. denied,* 474 U.S. 1105 (1986) as one of the decisions which had improperly applied a state's limitations period for intentional torts. Later in its opinion, this Court cited section 6-2-38(l) of the Alabama Code (formerly section 6-2-39(a)(5)) as an example of a general or residual personal injury statute of limitations which should apply to actions brought under section 1983. *See Owens,* at n.9.

Although a defense based upon good faith and probable cause technically is not an immunity, this Court previously has held that the existence of such common law defenses will provide the basis for the extension of qualified immunity in section 1983 actions. In *Imbler v. Pachtman,* 424 U.S. 409 (1976), this Court noted that section 1983 "is to be read in harmony with general principles of tort immunities and *defenses* rather than in derogation of them." *Id.* at 418 (emphasis added). Justice Blackmun, writing for the majority in *City of Newport v. Fact Concerts, Inc.,* 453 U.S. 247 (1981), stated that:

> [T]he Court has recognized immunities of varying scope applicable to different officals sued under [section 1983]. One important assumption underlying the Court's decisions in this area is that members of the 42d Congress were familiar with common-law principles, *including defenses previously recognized in ordinary tort litigation* and that they likely intended these common-law principles to obtain, absent specific provisions to the contrary.

Id. at 258 (emphasis added).

Recognition of this principle has led this Court to extend the defense of qualified immunity under circumstances very similar to those of the present action. For example, in *Wood v. Strickland,* 420 U.S. 308 (1975), this Court extended qualified immunity to public school officials in a section 1983 action arising out of the expulsion of students in light of the state tort law which imposed liability upon such officials for malicious acts only. *Id.* at 318. In *Pierson v. Ray,* 386 U.S. 547 (1967), qualified immunity was extended to police officers in a section 1983 action arising out of an alledgedly unlawful arrest in light of the defense to the common law tort of false imprisonment based upon good faith and probable cause. *Id.* at 555-57.

Strong policy reasons also warrant recognition of the qualified immunity defense under the circumstances of the present action. These policy reasons were discussed in detail in the Eleventh Circuit's majority opinion in this case. *See Jones v. Preuit & Mauldin,* 851 F.2d 1321, 1325 (11th Cir.

1988); *see also Buller,* 706 F.2d at 851; *Folsom Investment Co.,* 681 F.2d at 1038. Of the public policy justifications supporting the availability of a qualified immunity defense under these circumstances, "[t]he most important justification is that a citizen should not be penalized for resorting to the courts to vindicate rights he in good faith has probable cause to believe are his." *Folsom Investment Co.,* 681 F.2d at 1038. This justification for the defense is as valid today as it was when the defense was first recognized by the common law and particularly is strong in the context of actions involving creditor-debtor rights. If creditors are faced with the possibility of being liable in damages to debtors for the good faith enforcement of their rights through the courts, they may be more likely to attempt to enforce their rights through extrajudicial or self-help means. The result might be that debtors would be afforded fewer protections than they otherwise would have available to them in a judicially supervised action. The extension of qualified immunity to P & M under the circumstances of this case, therefore, is consistent with the principles enunciated by this Court in its prior decisions.[4]

The extension of qualified immunity to private individuals who invoke presumptively valid state pre-judgment attachment procedures is a proper and just result. This particularly is true when, as in the present action, the private individuals seek and rely upon the advice of an attorney who obtains an order from a state court judge, and otherwise act in a matter

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[4]Judge Hill, writing for the majority in the court below, also noted that the extension of qualified immunity to P & M is "supported by the general development of section 1983 law." *Jones v. Preuit & Mauldin,* 851 F.2d at 1325. The point made by Judge Hill was that this Court's decision in *Lugar v. Edmondson Oil Co.,* 457 U.S. 922 (1982) rests on the premise that, "in certain circumstances, private individuals may be *equated* with public actors for section 1983 purposes." 851 F.2d at 1325 (emphasis added). Judge Hill recognized that to deny private individuals qualified immunity while at the same time extending such immunity to public officials who had engaged in the same conduct would be inconsistent with *Lugar.* Indeed, this Court's decision in *Lugar* strongly implied that qualified immunity should be available to private individuals. *Lugar,* 457 U.S. at 942 n.23.

generally encouraged in our society — that of seeking redress through the courts. The fault, under these circumstances, for any perceived violation of the constitutional rights of the adverse party does not lie with the private individual who consulted with and relied upon an attorney and thereafter, with no reason to believe that his actions were in any way improper, invoked the aid of a state statute with the approval of a state court judge. To impose liability upon the private individual in such instances would be inconsistent with the common law and would result in the imposition of strict liability without furthering the goal of deterrence which section 1983 was designed, in part, to achieve. *See Owen v. City of Independence,* 445 U.S. 622, 651 (1980) (One purpose of § 1983 was "to serve as a deterrent against future constitutional deprivations.").

B. *The Eleventh Circuit Correctly Held That P & M Did Not Violate Petitioner's Clearly Established Constitutional Rights Of Which A Reasonable Person Would Have Known.*

The qualified immunity defense, as articulated by this Court, shields defendants "from liability for civil damages insofar as their *conduct* does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982) (emphasis added). The focus of the inquiry is upon the conduct and actions of the defendant and it is irrelevant that the statutes under which the defendant proceeded may have authorized some alternative procedure that may be constitutionally suspect. After holding that P & M was entitled to assert a qualified immunity defense, the Eleventh Circuit found that P & M's actions did not violate Petitioner's clearly established constitutional rights of which a reasonable person would have known. This finding is supported by an analysis of the pre-1982 decisions of this Court discussing the constitutionality of pre-judgment seizure provisions.

The four cases decided by this Court prior to 1982 dealing with the constitutionality of statutes providing for pre-

judgment seizure are *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), *Fuentes v. Shevin*, 407 U.S. 67 (1972), *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974) and *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975). However, the statutes at issue in each of these cases differed from the procedures followed by P & M. As a result, these decisions had not clearly established, at the time the writs of attachment were issued, that P & M's conduct violated Petitioner's due process rights.[5]

Contrary to Petitioner's assertions, *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974) does not require that the judge be vested with the discretion to determine the validity of the factual allegations set forth in the creditor's affidavit. At the very least, if such a requirement does exist, it was not clearly established at the time the attachments in the present action were issued. *Mitchell* emphasized that a pre-seizure hearing was not necessary under the circumstances of that case, implying that the judge need not receive any evidence or testimony other than the applicant's affidavit before issuing the writ. This Court specifically stated that "it comports with due process to permit the initial seizure on *sworn ex parte documents*, followed by the early opportunity to put the creditor to its proof." 416 U.S. at 610 (emphasis added).

Petitioner also contends that P & M's actions violated his

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[5]In 1978, the Fifth Circuit noted that "[t]he courts and commentators have struggled mightily to harmonize this line of decisions." *Johnson v. American Credit Co.*, 581 F.2d 526, 533 (5th Cir. 1978). In his concurring opinion, Justice Powell stated that *Mitchell* "withdraws significantly from the full reach" of the principle enunciated in *Fuentes*. *Mitchell*, 416 U.S. at 623 (Powell, J., concurring). Three of the four dissenting justices were of the opinion that *Mitchell* had "unmistakably overruled" *Fuentes*. *Id.* at 635 (Stewart, J., dissenting). In *Di-Chem*, Justice Blackmun, in a dissenting opinion joined by Justice Rehnquist, stated:

> [A]s a result [of the lack of guidance contained in this opinion], *the corresponding commercial statutes of all other States, similar to but not exactly like those of Florida or Pennsylvania or Louisiana or Georgia, are left in questionable constitutional status with little or no applicable standard by which to measure and determine their validity* under the Fourteenth Amendment.

419 U.S. at 614 (Blackmun, J., dissenting) (emphasis added).

constitutional rights of due process because he was not afforded an opportunity for a reasonably prompt post-seizure hearing. The Eleventh Circuit specifically found to the contrary, correctly noting that the state court judge conducted a reasonably prompt post-seizure hearing on the motions to dissolve the attachments filed on behalf of the involuntary plaintiffs.[6] Petitioner was represented by the same law firm that filed the dissolution motions on behalf of one of the involuntary plaintiffs. For some reason, Petitioner, after consultation with his attorney, elected not to follow the procedure followed by the involuntary plaintiffs although he did testify at the hearing on the motions to dissolve the attachments.

Given the state of the law at the time the attachments in the present action were issued, the Eleventh Circuit properly held that P & M was entitled to prevail on its defense of qualified immunity. As the majority opinion noted:

> P & M's efforts were arguably commensurate with the safeguards required by *Mitchell*. At best, one may argue that P & M's actions fall somewhere in the nebulous area that lies between *Mitchell* and *Di-Chem*. In either case, however, a reasonable person could have believed that the actions were constitutional.

Jones v. Preuit & Mauldin, 851 F.2d at 1328.

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[6]In his petition at p. 26, Petitioner asserts that the hearing held on the motions to dissolve the writs of attachment was, in reality, a final hearing on the merits of the case. This assertion simply is inaccurate and is not supported by any of the opinions written by the Eleventh Circuit. It is true that following the hearing on the motions to dissolve the writs of attachment, the state court judge did enter final judgments against the Petitioner in each of the lawsuits. However, at the time these judgments were entered, the Petitioner was in default for failure to file an answer or other pleading in any of the three lawsuits. As a result, there was no need for any further hearing before entry of final judgment.

III. The Conflict Among The Courts Of Appeals Asserted by Petitioner Is More Illusory Than Real.

Petitioner asserts that the Eleventh Circuit's *en banc* decision extending the defense of qualified immunity to private individuals in this case conflicts with decisions of other Courts of Appeals on the same issue. Petition at 11-12. This conflict is illusory; the great weight of relevant authority in the circuits is consistent with the decision below. *See DeVargas v. Mason & Hanger-Silas Mason Co.*, 844 F.2d 714 (10th Cir. 1988) (extending qualified immunity to private contractor acting pursuant to governmental contract); *Buller v. Buechler*, 706 F.2d 844 (8th Cir. 1983) (extending qualified immunity to private individual invoking state prejudgment attachment procedure); *Folsom Investment Co. v. Moore*, 681 F.2d 1032 (5th Cir. Unit A 1982) (same); *see also Duncan v. Peck*, 844 F.2d 1261 (6th Cir. 1988) (affirming summary judgment granted in favor of private individual defendant in section 1983 action arising out of pre-judgment attachment on basis of defendant's good faith reliance on his attorney).

The two cases upon which Petitioner relies do not establish a real conflict with these decisions. One of these decisions, *Howerton v. Gabica*, 708 F.2d 380 (9th Cir. 1983), did not provide any rationale whatsoever for its holding. *See id.* at 385 n.10. Indeed, in a later opinion, the Ninth Circuit seemed to retreat from its blanket holding in *Howerton* that private parties are not entitled to qualified immunity under section 1983. *See Thorne v. City of El Segundo*, 802 F.2d 1131, 1140 n.8 (9th Cir. 1986) (refusing to decide whether independent contractor of City could assert qualified immunity defense because parties had not raised issue).

In *Downs v. Sawtelle*, 574 F.2d 1 (1st Cir.), *cert. denied*, 439 U.S. 910 (1978), the First Circuit rested its holding on the premise that private individuals could not claim an immunity derivatively from the immunity afforded public officals with whom they act in concert. *Id.* at 15. This analysis is correct as far as it goes but the First Circuit did not address whether private individuals may be entitled to qualified immunity in their own right under the functional approach to immunities

outlined by this Court. *See, e.g., Harlow v. Fitzgerald,* 457 U.S. 800, 810-11 (1982). *Downs* was decided prior to this Court's decisions in *Harlow* and *Owen v. City of Independence,* 445 U.S. 622 (1980) which set forth the standards to be applied in analyzing the qualified immunity question. Faced with this same question again, the First Circuit might well reach a different result in light of the intervening decisions from this Court and the other circuits.

IV. Petitioner's Waiver Of His Right To Claim That The Post-Seizure Remedies Available Under Alabama Law Do Not Comport With Due Process Constituties An Independent Ground For Affirmance Of The Eleventh Circuit.

One of the defenses raised by P & M to Petitioner's section 1983 claim was that of waiver. Due to its resolution of the qualified immunity issue, the Eleventh Circuit did not reach the waiver issue. However, Petitioner's waiver of his right to claim that the post-seizure remedies available under Alabama law did not comport with due process constitutes an independent ground for affirmance of the Eleventh Circuit's decision.

It is well established among the courts of appeals that the right to procedural due process is a right which can be waived. *See, e.g., Grandison v. Smith,* 779 F.2d 637, 641 (11th Cir. 1986); *Fern v. Thorp Public School,* 532 F.2d 1120 (7th Cir. 1976); *Kaprelian v. Texas Woman's University,* 509 F.2d 133 (5th Cir. 1975). Waiver can be implied in a course of conduct followed by the person asserting the right. *See Fern,* 532 F.2d at 1134.

Petitioner failed to avail himself of the opportunities available to him at the post-seizure hearing conducted in his case by the state court judge. Petitioner's only action in attempting to attack the attachments was the filing of motions under Rule 65.1 of the Alabama Rules of Civil Procedure some eighteen months after the issuance of the writs of attachment. Petitioner now asserts that Alabama's post-

seizure remedies are not sufficient for due process purposes. Petitioner has waived any such claim by his failure to pursue the remedies readily available to him.

CONCLUSION

For the foregoing reasons, the Respondents request that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served three copies of the foregoing Respondents' Brief in Opposition upon all parties required to be served, C. V. Stelzenmuller, Esq., Burr & Forman, 3000 SouthTrust Tower, Birmingham, Alabama 35203, and Robert H. Weinberg, Esq., Assistant Attorney General of Alabama, State House, 11 South Union Street, Montgomery, Alabama 36130, by placing same in the United States mail, first-class postage prepaid on this the ___ day of January, 1989.

_____

Donald M. James

APPENDIX

§ 6-2-34. Same — Six years.

The following must be commenced within six years:

(1) Actions for any trespass to person or liberty, such as false imprisonment or assault and battery;

(2) Actions for any trespass to real or personal property;

(3) Actions for the detention or conversion of personal property;

(4) Actions founded on promises in writing not under seal;

(5) Actions for the recovery of money upon a loan, upon a stated or liquidated account or for arrears of rent due upon a parol demise;

(6) Actions for the use and occupation of land;

(7) Motions and other actions against the sureties of any sheriff, coroner, constable or any public officer and actions against the sureties of executors, administrators or guardians for any nonfeasance, misfeasance or malfeasance, whatsoever, of their principal, the time to be computed from the act done or omitted by their principal which fixes the liability of the surety;

(8) Motions and other actions against attorneys-at-law for failure to pay over money of their clients or for neglect or omission of duty; and

(9) Actions upon any simple contract or speciality not specifically enumerated in this section.

§ 6-2-38. Same — Two years.

(a) An action by a representative to recover damages for wrongful act, omission or negligence causing the death of the decedent under sections 6-5-391 and 6-5-410 must be commenced within two years from the death.

(b) All actions by common carriers of property subject to chapter 3 of Title 37 for recovery of their charges, or any part thereof, shall be begun within two years from the time the cause of action accrues and not after.

(c) For recovery of charges, action shall be begun against

common carriers of property by motor vehicles subject to this article within two years from the time the cause of action accrues and not after, except as provided in subsection (d) of this section; provided, that if claim for the overcharge has been presented in writing to the carrier within the two year period of limitation, said period shall be extended to include six months from the time notice in writing is given by the carrier to the claimant of disallowance of the claim, or any part or parts thereof, specified in the notice.

(d) If on or before the expiration of the two-year period of limitation in subsection (c) of this section, a common carrier by motor vehicle subject to chapter 3 of Title 37 begins action under subsection (c) of this section for recovery of charges in respect of the same transportation service or, without beginning action, collects charges in respect of that service, said period of limitation shall be extended to include 90 days from the time such action is begun or such charges are collected by the carrier.

(e) The cause of action in respect of a shipment of property shall, for the purpose of subsections (b) through (f), of this section be deemed to accrue upon delivery or tender of delivery thereof by the carrier and not after.

(f) The term "overcharges" as used in subsections (b) through (e) of this section shall mean charges for transportation services in excess of those applicable thereto under the tariffs lawfully on file with the public service commission.

(g) Any action brought under section 25-5-11(b) must be brought within two years of such injury or death.

(h) All actions for malicious prosecution must be brought within two years.

(i) All actions for seduction must be brought within two years.

(j) All actions qui tam or for a penalty given by statute to the party aggrieved, unless the statute imposing it prescribes a different limitation, must be brought within two years.

(k) All actions of libel or slander must be brought within two years.

(l) All actions for any injury to the person or rights of

another not arising from contract and not specifically enumerated in this section must be brought within two years.

(m) All actions for the recovery of wages, overtime, damages, fees or penalties accruing under laws respecting the payment of wages, overtime, damages, fees and penalties must be brought within two years.

(n) All actions commenced to recover damages for injury to the person or property of another wherein a principal or master is sought to be held liable for the act or conduct of his agent, servant or employee under the doctrine of respondeat superior must be brought within two years.

(o) All actions commenced under section 6-5-411 to recover damages for injury or damage to property of a decedent must be brought within two years.

(p) If any action is commenced before the time limited has expired, judgment is entered for the plaintiff and such judgment is arrested or reversed on appeal, the plaintiff or his legal representative may commence an action again within one year from the reversal or arrest of such judgment though the period limited may in the meantime have expired; and in like manner, if more than one judgment is arrested or reversed, an action may be recommenced within one year.

§ 6-2-39. Same — One year. (Repealed January 9, 1985).

(a) The following must be commenced within one year:

(1) Actions for malicious prosecution;

(2) Actions for seduction;

(3) Actions qui tam or for a penalty given by statute to the party aggrieved, unless the statute imposing it prescribes a different limitation;

(4) Actions of libel or slander; and

(5) Actions for any injury to the person or rights of another not arising from contract and not specifically enumerated in this section; and

(6) All actions for the recovery of wages, overtime, damages, fees or penalties accruing under laws respecting

the payment of wages, overtime, damages, fees and penalties.

(7) All actions commenced to recover damages for injury to the person or property of another wherein a principal or master is sought to be held liable for the act or conduct of his agent, servant or employee under the doctrine of respondeat superior.

(8) All actions commenced under section 6-5-411 to recover damages for injury or damage to property of a decedent.

(b) If any action is commenced before the time limited has expired, judgment is entered for the plaintiff and such judgment is arrested or reversed on appeal, the plaintiff or his legal representative may commence an action again within one year from the reversal or arrest of such judgment though the period limited may in the meantime have expired; and in like manner, if more than one judgment is arrested or reversed, an action may be recommenced within one year.

§ 6-6-41. Matters for which issued.

Attachments may issue:

(1) To enforce the collection of a debt, whether it be due or not, at the time the attachment is taken out;

(2) For any moneyed demand, the amount of which can be certainly ascertained;

(3) To recover damages for a breach of contract, when the damages are not certain or liquidated; or

(4) When the action sounds in damages merely.

§ 6-6-42. Cases in which issued.

In the following cases attachments may issue:

(1) When the defendant resides out of the state;

(2) When the defendant absconds;

(3) When the defendant secretes himself so that the ordinary process of law cannot be served on him;

(4) When the defendant is about to remove out of the state;

(5) When the defendant is about to remove his property out of the state, so that the plaintiff will probably lose his debt or have to sue for it in another state;

(6) When the defendant is about fraudulently to dispose of his property;

(7) When the defendant has fraudulently disposed of his property; or

(8) When the defendant has moneys, property or effects liable to satisfy his debts which he fraudulently withholds.

§ 6-6-43. By whom issued.

In the first and second cases mentioned in section 6-6-41, an attachment may be issued by any judge of the circuit court, returnable to any county in the state, or by the clerk of the circuit court, judge of probate or any district court judge, within their respective counties; in the third and fourth cases, only by a judge of the circuit court or judge of probate, returnable to any county.

§ 6-6-44. Oath of plaintiff.

The officer, before issuing the attachment in the first two cases mentioned in section 6-6-41, must require the plaintiff, his agent or attorney to make oath of the amount of the debt or demand and that it is justly due, or to become due, that one of the causes enumerated in section 6-6-42 exists and that the attachment is not sued out for the purpose of vexing or harassing the defendant; and such oath must be reduced to writing and subscribed by the party making it.

§ 6-6-45. Execution of bond by plaintiff; discharge of levy.

Such officer must, when the attachment is sued out otherwise than upon the ground that the defendant is a nonresi-

dent, further require the plaintiff, his agent or attorney to execute a bond in double the amount claimed, with sufficient surety, payable to the defendant, with the condition that the plaintiff will prosecute the attachment to effect and pay the defendant all such damages as he may sustain by the wrongful or vexatious suing out of such attachment. When the attachment is sued out upon the ground that the defendant is a nonresident, such officer shall issue the writ with or without a bond being given, as the plaintiff may elect. If such attachment is issued without bond, that fact must be endorsed on the writ. Should the defendant before the return day thereof, in person or through his agent or attorney, make an unqualified appearance in the case, it is the duty of the clerk to issue notice to the plaintiff or his attorney of the fact of such appearance. Unless, within five days after the service of such notice, the plaintiff shall make bond payable to the defendant in double the amount sued for, such levy shall be discharged.

§ 6-6-46. When additional affidavit of special facts and circumstances to determine amount of levy required; reduction of sum.

When an attachment is applied for in the cases provided for in the third and fourth subdivisions of section 6-6-41, the judge, before issuing it, must require the plaintiff, his agent or attorney, in addition to the affidavit and bond required in other cases, to make affidavit in writing of the special facts and circumstances so as to enable him to determine the amount for which a levy must be made, which sum may, at the discretion of the court, be reduced at the return of the attachment, on affidavit of the defendant, and the levy released to the amount of such reduction.

§ 6-6-100. By whom; execution of bond.

The defendant in attachment or, in his absence, a stranger, may replevy the goods or chattels attached, or any part thereof, by executing bond, with sufficient sureties, payable

to the plaintiff, in double the value of the property replevied, to be determined by the officer making the levy, with condition that if the defendant fails in the action, the principal in the bond or his sureties will return the specific property attached within 30 days after the judgment, which bond must be returned with the other papers of the case.

§ 6-6-142. Dismissal of attachment.

An attachment issued without affidavit and bond, as prescribed in division 2 of this article, may be dismissed on motion of the defendant, filed within 30 days after service of summons on a complaint.

§ 6-6-146. Restoration of property to claimant at plaintiff's cost.

If the plaintiff does not obtain judgment against the defendant in attachment, all property condemned, when a claim for the trial of the right of property has been interposed, must be restored to the claimant at the cost of the plaintiff.

§ 6-6-148. Action by defendant — On attachment bond for damages.

At any time within three years of the suing out of the attachment, before or after the action is determined, the defendant in attachment may commence an action on the attachment bond and may recover such damages as he has actually sustained if the attachment was wrongfully sued out and, if sued out maliciously as well as wrongfully, the jury may, in addition, give vindictive damages.

§ 35-11-110. Lien declared.

Any blacksmith, woodworkman or other mechanic who contributes his labor and material, or either, to the production, manufacture or repair of any vehicle, implement, machine or article of any kind, shall have a lien thereon in

the hands of any person for whom such vehicle, implement, machine or article was made or repaired, or to whom sold, and in the hands of any purchaser with notice of such lien, for the agreed price, or the value if no price was agreed upon, of the labor and material, or either, contributed to the production, manufacture or repair of the same. Said lien shall be subordinate to any security interest under the Uniform Commercial Code in such vehicle, implement, machine or article, which security interest was perfected prior to the time said labor or material was contributed, unless the secured party holding said security interest authorized the contribution of said labor or material.

§ 35-11-111. Right to enforce lien by attachment.

Any person entitled thereto may enforce such lien in any court of competent jurisdiction, by attachment issued by any officer authorized to issue such writs, upon executing bond as in other cases of attachment, and upon making affidavit that the attachment is not sued out for the purpose of vexing or harassing the defendant, and describing the property on which the lien is claimed and setting forth all the facts necessary to the creation of the lien under section 35-11-110, and the amount due, and that one of the following causes of attachment exists:

(1) That the person for whom such vehicle, implement, machine or article was made or repaired, or to whom sold, is the owner thereof, and that the price, if agreed on, or if not, the value of the same, or of the rapair thereof, or some part of either, is due and unpaid.

(2) That the person for whom such vehicle, implement, machine or article was made or repaired, or to whom sold, has transferred or sold the same to a purchaser with notice of the lien, and that the price, if agreed on, or if not, the value of the same, or of the repair thereof, or of some part of either, is due and unpaid.

RULE 65.1. SECURITY: PROCEEDINGS AGAINST SURETIES

Whenever these rules require or permit the giving of security by a party, and security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits himself to the jurisdiction of the court and irrevocably appoints the clerk of the court as his agent upon whom any papers affecting his liability on the bond or undertaking may be served. His liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the sureties if their addresses are know.

(dc) District Court Rule. Rule 65.1 applies in the district courts.